IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1936

FRANCIS E. RINEHART,

Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS AND THE SUPREME COURT, APPELLATE DIVISION OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS

FRANCIS E. RINEHART
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August, 1979

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PRELIMINARY STATEMENT

Appellee has filed a "Brief and Motion to Dismiss Appeal" which disputes the jurisdiction of this Court to hear this case, makes another non-differing statement of the case, and gives two reasons why the Court has no jurisdiction. Neither "point" raises any new facts or law nor covers any matter not covered in the Jurisdictional Statement. Both ignore the true tenets of Theard v. United States, 354 U.S. 278 (1957) that disbarment is serious, that common sense must be used, and conduct and circumstances must somewhere be considered for there to be fairness and due process of law.

Jurisdiction of the appeal is conferred upon this Court by Title 28, U.S.C. section 1257(2). Validity of the Judiciary Law of New York, section 90, subd. 4, is drawn into question on the ground of its being repugnant to the Constitution and the decision appealed from is in favor of its validity.

Jurisdiction to review a case from a state court has come to be considered as dependent not merely upon an appellant's claim of a substantial federal question but upon the Court agreeing that one exists.

Since appellant's claim is clearly not frivolous or utterly lacking in merit, appellee's first point is that review of the federal question is foreclosed by the Court's prior decisions denying appeal and that there are no grounds for reconsidering those decisions of insubstantialty. In point "Two", appellee appears to assert there is no federal question at all for appellant had his chance at due process in prior criminal proceedings and failed to take it and the denial by an automatic disbarment statute of the right to a disciplinary hearing ordered by the Appellate Division where one is needed is not a right that is protected by the Constitution.

POINT ONE

APPELLANT DOES PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Fourteenth Amendment of the Constitution, section 1, which became effective in 1868, includes the following provision:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant has been deprived of his "liberty" and "property" by New York without due process of law. As interpreted by the New York Court of Appeals to mandate that the Appellate Division withdraw a hearing it deemed necessary and automatically disbar appellant, The Judiciary Law, Section 90, subdivision 4, has been "made" and "enforced" to abridge the privileges and immunities of appellant, a citizen of the United States. Appellant has also been denied the equal protection of the laws. These are substantial federal questions.

Appellee cites seven instances in which this Court denied review of state debarment proceedings and asserts that appellant has raised no issue to distinguish his case from these. (Appellee's Brief, p. 4,5). Appellee puts appellant in rough company and says his conduct was worse. In appellee's opinion omitting income received and returned in the same year from a tax return is worse than tax evasion and fraud. Appellant finds no basis for such an opinion. Appellee concludes that appellant's conduct violated a "perjury statute" and that this evidences more serious professional misconduct than tax evasion.

As a matter of Federal law, it may be that section 7206(1) involves "perjury", although it provides a lesser penalty than the perjury statute, 18 U.S.C. section 1621. But the Massachusetts Bar hearing committee agreed with the sentencing judge "that this case is not the typical tax fraud case, but is more a case of an inordinately stubborn taxpayer involved in a feud with the Internal Revenue Service". The committee did not "believe that he engaged in conduct involving

dishonesty, fraud or deceit", and it seems clear that the sentencing judge treated the statute as imposing liability without fraud. Accordingly, the Supreme Judicial Court of Massachusetts accepted the recommendation of the hearing committee. Evasion of tax would appear the only logical purpose for perjury on a tax return, and appellant did not do this.

The Appellate Division, in each of the seven cases cited by appellee, itself exercised the discretionary disciplinary option then open to it under the Judiciary Law, section 90, subdivision 2, and held that automatic disbarment under subdivision 4 was proper considering the conduct and circumstances in each case.

In appellant's case, however, the Appellate Division twice rejected appellee's motion for automatic disbarment and held that the conduct and circumstances justified a hearing to take testimony in regard to the charges and to report the same with opinion of the referee thereon to the court. This was after Matter of Chu, 42 N.Y.2d 490, cited in the seven cases to deny a hearing and disbar.

It was the Appellate Division's view that Chu could reasonably be interpreted to allow discretion to it in appellant's case for evaluation of the particular conduct involved.

In Thies, the "Appellate Division held that conviction in federal court of the felony of assault upon a federal officer warrants disbarment."

In Brasco, the attorney sought a stay pending motion for a new trial. The Appellate Division held that the conviction warranted disbarment.

In Podell (Driesman), section 7206(2) was violated by aiding and counselling a false return and the Appellate Division on motion vacated an order for disciplinary proceeding and granted a motion to strike the attorney's name from the rolls.

In Fayer, the Appellate Division granted a motion to strike where the felony was violation of 18 U.S.C. section 1623 by false testimony as a witness and attempting to influence a witness not to testify.

In Rosenberg, the Appellate Division granted a motion to strike where the offense was an attempt to evade and defeat a large part of tax owed by preparing a false return, violating both 26 U.S.C. sections 7201 and 7206(1).

In Davis and Peltz, both in 1978, the Appellate Division granted a motion to disbar and withdrew hearings granted. This was after the Chu decision in 1977.

Only in appellant's case did the Appellate Division recall its order, made and reaffirmed, because it was compelled to do so by the majority opinion in Thies directly overruling what had long been the law of the state, that only where an attorney is convicted of a crime deemed to be a felony under New York law is the discretion of the Appellate Division foreclosed and automatic disbarment without a hearing is mandatory.

POINT TWO

APPELLANT HAS BEEN DEPRIVED OF HIS CONSTITUTIONALLY PROTECTED RIGHTS BY THE APPLICATION OF THE NEW YORK AUTOMATIC DISBARMENT STATUTE.

Certainly appellant's right to work in the profession he has chosen and in which he has qualified is both a "liberty" and "property" guaranteed by the Constitution, and is one of the "privileges" or "immunities" of United States citizens. No State may make or enforce any law which abridges those privileges or immunities nor shall any State deprive appellant of his liberty and property in the practice of his profession without due process of law nor deny to appellant, a person within its jurisdiction, the equal protection of the laws. Nor can appellant be denied a hearing where the state court responsible for removal from practice has found it necessary.

Certainly also a state in the exercise of its retained and proper police power can set reasonable requirements for the disbarment of an attorney in its courts. The state legislature may require automatic disbarment for conduct it has deemed to be felonious and enacted a felony statute.

However, conduct it has not so deemed may not automatically disbar an attorney until either the legislature or the court in charge of disbarment determines it to merit disbarment. The legislature may not delegate to Congress the duty it has to determine what conduct merits automatic disbarment. It may, however, delegate this duty to the state court to which it has committed the responsibility for removal from practice, provided it leaves such court with discretion to determine the nature of the offense and the circumstances so that automatic disbarment is mandatory only absent compelling mitigating circumstances of substantial merit.

The New York Legislature never intended to do otherwise. Two bills were passed by both houses immediately after the Thies case to overrule the decisions in Thies and Chu which held that the existing provisions of the Judiciary Law mandated the disbarment of an attorney upon conviction of a felony in a jurisdiction other than New York even if the offense would not constitute a felony under New York law. On July 15, 1979, the Governor approved Assembly Bill 6252-A to amend the provisions of the

Judiciary Law relating to automatic disbarment of an attorney upon his conviction of a felony to limit the application of such provisions to a conviction of an offense which constitutes a felony under the laws of New York. The Assembly Bill, in addition, establishes procedures for the automatic suspension of an attorney convicted of a felony under the laws of New York, or of a "serious crime" as that term is defined in the bill. "Following suspension, a hearing would be held to determine whether disbarment or other disciplinary action is warranted. Assembly Bill 6252-A, therefore, will not only prevent the automatic disbarment of an attorney without sufficient cause, it will also provide the public with necessary protection against attorneys who have been convicted of serious criminal offenses." (Press Release, July 13, 1979, Governor Hugh L. Carey).

Had appellant litigated the tax case as appellee says he should have, appellant may have proven in that case, as he did to the Massachusetts Board of Bar Overseers, that he "possesses moral qualifications to practice law". (Findings and Recommendations of a panel of the Board of Bar Overseers,

April 9, 1979). But it cannot suffice for due process of law that because he did not he may be denied a hearing granted him by the Appellate Division regardless of the nature of his offense or his actual conduct, which was void of dishonesty, fraud or deceit.

CONCLUSION

The motion to dismiss appeal should be denied.

Respectfully submitted,

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Appellant Pro Se

August 1979